

**Letter of Findings: 04-20130558**  
**Sales and Use Tax**  
**For the 2010 and 2011 Tax Years**

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**ISSUES**

**I. Sales and Use Tax – Imposition.**

**Authority:** IC § 6-2.5-2-1; IC § 6-2.5-3-4; IC § 6-2.5-5-1 et seq.; IC § 6-2.5-5-3; IC § 6-2.5-5-24; IC § 6-2.5-8-8; IC § 6-8.1-5-1; [45 IAC 2.2-5-25](#); [45 IAC 2.2-8-12](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974).

Taxpayer protests the imposition of use tax.

**STATEMENT OF FACTS**

Taxpayer operates a welding business as a sole proprietorship. The Indiana Department of Revenue ("Department") conducted a sales/use tax audit of Taxpayer for the 2010 and 2011 tax years. After the investigation, the Department determined that Taxpayer owed additional sales and use tax and assessed tax for the 2010 and 2011 tax years. Taxpayer protested the sales and use tax assessments. An administrative hearing was conducted, and this Letter of Findings results. Further facts will be supplied as required.

**I. Sales and Use Tax – Imposition.**

The Department assessed Taxpayer additional use tax on several purchases. Taxpayer protests the imposition of use tax on several of the items reviewed in the audit.

As a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). In accordance with IC § 6-2.5-2-1(b) while the acquirer of the tangible personal property is liable for the sales tax, charged by the retail merchant as a separate added amount, the retail merchant collects the tax as an agent for the state. There are exemptions available for sales tax. IC § 6-2.5-3-4, IC § 6-2.5-5-1 et seq. A statute which provides a tax exemption, however, is strictly construed against the taxpayer. Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). "[W]here such an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law." Id. at 101.

For one of the items protested, Taxpayer's representative explained that there was an exemption certificate for one of Taxpayer's customers that had the incorrect customer name on it. Taxpayer asked that the Department adjust the audit assessment to reflect the fact that it was not required to collect sales tax from the customer represented by the exemption certificate.

Taxpayer is correct that under certain circumstances, a retail merchant such as Taxpayer is not required to collect sales tax. Under IC § 6-2.5-8-8(a), "A person . . . who makes a purchase in a transaction which is exempt from the state gross retail tax and use taxes, may issue an exemption certificate to the seller instead of paying the tax." Once the purchaser provides the exemption certificate, the retail merchant is under no obligation to collect sales tax on the transaction. IC § 6-2.5-8-8(a) states that, "A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase."

[45 IAC 2.2-8-12](#) imposes certain limitations on the use of the exemption certificate and imposes on the vendor responsibility for either collecting the tax or obtaining the certificate.

(a) Exemption certificates may be [issued] only by purchasers authorized to issue such certificates by the Department of Revenue. Retail merchants, manufacturers, wholesalers and others who must register with the Department of Revenue and who qualify to purchase exempt from tax under this Act [\[IC 6-2.5\]](#) may issue exemption certificates with respect to exempt transactions. All persons or entities not required to register with the Department as retail merchants, manufacturers, or wholesalers, and who are exempt under this Act [\[IC 6-2.5\]](#) with respect to all or a portion of their purchases are authorized to issue exemption certificates with respect to exempt transaction provided an exemption number has been assigned by the Department of Revenue, or provided that the Department of Revenue has specifically provided a form and manner for issuing exemption certificates without the need for assigning an exemption number.

(b) **Retail merchants are required to collect the sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used by the purchaser for an exempt purpose.**

(c) All retail sales of tangible personal property for delivery in the state of Indiana shall be presumed to be subject to sales or use tax until the contrary is established. The burden of proof is on the buyer and also on the seller unless the seller receives an exemption certificate.

(d) **Unless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose. It is, therefore, very important to the seller to obtain an exemption certificate in order to avoid the necessity for such proof. The mere filing of a Registered Retail Merchant Certificate number is not sufficient to relieve the seller of the responsibility to collect the sales tax or prove exempt use by the buyer.**

(e) No exemption certificates are required for sales in interstate commerce, however, proper records must be maintained to substantiate such sales.

(f) An exemption certificate issued by a purchaser shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed.

(g) An exemption certificate or other evidence supporting an exempt sale must be maintained by the seller for at least three (3) years after the due date of the tax return upon which such exempt transaction is reported.

(h) Exemption certificates may be reproduced provided no change is made in the wording or content.

**(Emphasis added).**

Therefore, as provided by IC § 6-2.5-8-8(a), a vendor such as Taxpayer accepting a valid exemption certificate has no duty to collect or remit the state gross retail or use tax on a purchase. However, the certificate is not dated, and therefore it cannot be concluded that it is contemporaneous to the transactions at issue. As provided in [45 IAC 2.2-8-12\(f\)](#), an exemption certificate issued by a purchaser is not valid unless it is executed in the prescribed and approved form and unless all information requested on the form is completed. In the absence of valid exemption certificates, [45 IAC 2.2-8-12\(d\)](#) makes it clear that Taxpayer bears the burden of proving that sales tax was remitted to the State or that Taxpayer's customers did indeed use the diesel fuel for exempt purposes.

For a few of the other items protested, Taxpayer claims that the items are exempt because they were used by Taxpayer in repair work that Taxpayer did for the United States Navy or Army, or a military contractor, stating that all three of the organizations are tax exempt.

IC § 6-2.5-5-24(a) states in relevant part:

Transactions are exempt from the state gross retail tax to the extent that the gross retail income from those transactions is derived from gross receipts that are:

(1) **derived from sales to the United States government, to the extent the state is prohibited by the Constitution of the United States from taxing that gross income; (Emphasis added).**

[45 IAC 2.2-5-25\(a\)](#) goes on to state:

There is not a blanket exemption from the sales tax for purchases by governmental agencies and units. It provides that only the purchase of tangible personal property used by the governmental agency in connection with a governmental function may be purchased exempt from sales tax.

Taxpayer provided the invoices showing purchases that it made, where sales tax was not paid; however, it has not provided evidence that it then sold the items to the United States government. Further, Taxpayer has not explained how a government contractor would be exempt from sales tax. In either case, without an exemption certificate, sales tax should have been collected, or, alternatively, Taxpayer should have provided invoices for the products sold and/or services rendered to these customers.

For the remaining items, Taxpayer claims that the items purchased were used to repair its customers' machines that were used in the customers' daily production; however, the manufacturing exemption found in IC § 6-2.5-5-3 applies to the purchaser "if the person acquiring that property acquires it for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property." The exemption does not extend to the seller, and without an exemption certificate, sales tax should have been collected.

Having not provided the necessary exemption certificates, or establishing that some other exemption applies to the purchases, Taxpayer has failed to meet its statutory responsibility of demonstrating that the proposed assessment is incorrect. IC § 6-8.1-5-1(c). Therefore, Taxpayer's protest regarding the assessment of additional sales and use tax is denied.

### FINDING

Taxpayer's protest is respectfully denied.

*Posted: 12/25/2013 by Legislative Services Agency*

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